

BACKGROUND

The City of Redmond (employer) is located in King County, to the east of Lake Washington. Among other municipal services, the employer operates a police department headed by a chief of police. A restructuring of that department in 1997 resulted in the creation of an "assistant chief" position and four "commander" positions. The employer promulgated a job description that covers all four commanders, and does not make any distinction among them.

In its petition, Service Employees International Union, Local 519 (union), described the proposed bargaining unit in terms of job titles, including "assistant chief" and "commander". Under Commission practice and precedents, that unit is properly described as a separate unit of supervisory law enforcement officers.

The employer and the Redmond Police Association have existing bargaining relationships for two bargaining units:

1. A bargaining unit of non-supervisory law enforcement officers up to and including the "lieutenant" rank; and
2. A bargaining unit of police support personnel.

In the past, the employer has assigned employees in the "commander" rank to participate on its bargaining teams for negotiations concerning those bargaining units. There have been instances where one individual participated in the negotiations for both units, as well as instances where more than one individual was involved.

In its initial response to the petition in this case, the employer asserted that all of the employees in the proposed bargaining unit were confidential employees. It also asserted that the assistant chief was a supervisor of the commanders. By the time the

investigation conference was conducted, the employer had modified its position to assert that only the assistant chief and two of the commanders should be excluded from the proposed unit. At the hearing, the parties stipulated that the assistant chief was properly excluded from the proposed unit.

POSITION OF THE PARTIES

The employer contends that the positions held by Terrance Morgan (administrative commander) and Edward Billington (day-shift operations commander) are properly excluded from all bargaining rights under RCW 41.56.030(2)(c). It argues that the previous incumbents of those positions were consistently involved in collective bargaining negotiations on behalf of the employer, that Morgan has knowledge of confidential information based on his involvement in meetings with the command staff and the mayor, and that Billington was involved in negotiations for the existing unit of non-supervisory law enforcement officers.

The union argues that the employer's attempt to exclude 50% of the proposed bargaining unit (two of the four employees remaining after the stipulated exclusion of the assistant chief) is "outside the scope of any reasonable number of confidential employees an employer would be allowed to exempt." The union also contends that this employer could negotiate contracts covering the existing units without using any of the commanders at the bargaining table, and that exclusion of the disputed positions will not preclude the employer from also involving the remaining commanders in collective bargaining, so that acceptance of the employer's position would exclude (or could lead to exclusion of) an excessive class of "confidential" employees.

DISCUSSIONApplicable Legal StandardsUnit Placement of Supervisors -

There is no definition of "supervisor" in Chapter 41.56 RCW, but the Commission routinely excludes supervisors from units containing rank-and-file employees, in order to avoid conflicts of interest. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). In that context, the definitions found in the National Labor Relations Act and the Educational Employment Relations Act, Chapter 41.59 RCW, have been cited as indicating types of authority which pose a potential for conflicts of interest. RCW 41.59.030(4)(d) includes:

[S]upervisor,. . . means any employee having authority, in the interest of an employer, to hire, assign, promote, transfer, layoff, recall, suspend, discipline, or discharge other employees, or to adjust their grievances, or to recommend effectively such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature but calls for consistent exercise of independent judgement. The term "supervisor" shall include only those employees who perform a preponderance of the above-specified acts of authority.

As a general proposition, a separate unit of supervisors will be found appropriate. While WAC 391-35-340(2) was not effective until a few months after the petition was filed to initiate this proceeding, that rule merely codified a long line of precedents dating back to *City of Tacoma*, Decision 95-A (PECB, 1977); *Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries*, 88 Wn.2d 925 (1977); and *City of Richland, supra*.

Under *City of Seattle*, Decision 1797-A (PECB, 1985), supervisors in multiple ranks under a para-military structure will be included in a single unit of supervisors, reflecting:

- A community of interests among supervisors who, although they are employees within the coverage of the statute, must be excluded from the unit of non-supervisory employees;
- Avoidance of work jurisdiction claims and conflicts that tend to arise whenever two or more bargaining units share or interchange assignments;¹ and
- Avoidance of a proliferation of collective bargaining, mediation, and interest arbitration processes among bargaining units of uniformed personnel.²

Exclusion of Confidential Employees -

Confidential employees are excluded from the coverage of the Public Employees' Collective Bargaining Act under RCW 41.56.030(2)(c), which provides:

(2) "Public employee" means any employee of a public employer except any person . . . (c) whose duties as deputy, administrative assistant or secretary necessarily imply a confidential relationship to (i) the executive head or body of the applicable bargaining unit . . .

¹ See *South Kitsap School District*, Decision 472 (PECB, 1978) and numerous subsequent decisions concerning "skimming" of bargaining unit work.

² Both supervisory and non-supervisory law enforcement officers employed by this employer are "uniformed personnel" within the meaning of RCW 41.56.030(7), and have access to interest arbitration under RCW 41.56.430 through .490.

The Commission set forth standards for administration of that exclusion in WAC 391-35-320, as follows:

WAC 391-35-320 Exclusion of confidential employees. Confidential employees excluded from all collective bargaining rights shall be limited to:

(1) Any person who participates directly on behalf of an employer in the formulation of labor relations policy, the preparation for or conduct of collective bargaining, or the administration of collective bargaining agreements, except that the role of such person is not merely routine or clerical in nature but calls for the consistent exercise of independent judgment; and

(2) Any person who assists and acts in a confidential capacity to such person.

While that rule also became effective after the petition was filed to initiate this proceeding, it also merely codified established precedents. See *IAFF, Local 469 v. City of Yakima*, 91 Wn.2d 101 (1978), where the Supreme Court of the State of Washington gave RCW 41.56.030(2)(c) a narrow interpretation and limited its effect to individuals qualifying under a "labor nexus" test, as follows:

We hold that in order for an employee to come within the exception of RCW 41.56.030(2), the duties which imply the confidential relationship must flow from an official intimate fiduciary relationship with the executive head of the bargaining unit or public official.

The nature of this close association must concern the official and policy responsibilities of the public official or executive head of the bargaining unit, including formulation of labor relations policy. General supervisory responsibility is insufficient to place an employee within this exclusion.

In *Yakima*, the Supreme Court also embraced the definition of "confidential employee" found in the Educational Employment Relations Act, at RCW 41.59.020(4)(c). That is the definition which has been codified in WAC 391-35-320.

Decisions on exclusions of confidential employees are made on a case-by-case analysis of *current* facts, and the *actual* duties (rather than job descriptions or titles) of positions are controlling in making such determinations. An intimate fiduciary relationship qualifying an individual for the exclusion must be with a department head or other management official responsible for the formulation of labor policy, and the qualifying involvement with confidential material must be "necessary", "regular", and "ongoing". *City of Cheney*, Decision 3693 (PECB, 1991).

The party proposing "confidential" status bears a heavy burden of proving the necessity for excluding an employee from all of the rights conferred by the collective bargaining statute. *City of Seattle*, Decision 689-A (PECB, 1979). Application of that burden requires a decision against exclusion where the evidence offered in support of a confidential claim is ambiguous or contradictory, *Pateros School District*, Decision 3911-B (PECB, 1992).

In the context of the bargaining unit of supervisors proposed in this case, it is important to reiterate that the "labor nexus" test does not include general personnel functions that are common indicia of supervisory authority, such as contract interpretation, taking disciplinary actions that could be subjects of grievances, and processing grievances. *City of Seattle*, Decision 689-C, (PECB, 1981); *City of Yakima*, Decision 4625 (PECB, 1994). Similarly, occasional or incidental involvement of supervisors who merely provide input to an employer's labor policy makers concerning the

impact of various contract proposals is not sufficient. *King County*, Decision 4004-A (PECB, 1992). Such normal supervisory functions, without more, do not support an exclusion from all bargaining rights as a confidential employee. *Mason County*, Decision 1552 (PECB, 1983).

Employers will be allowed some reasonable number of personnel who are excluded from collective bargaining rights in order to perform the functions of the employer in the collective bargaining process, but nothing in Chapter 41.56 RCW or *City of Yakima, supra*, guarantees an employer any particular number or ratio of confidential exclusions. *Clover Park School District*, Decision 2243-A (PECB, 1987).

Application of Standards

The Assistant Chief -

Larry Gainer oversees all four commanders, in addition to having responsibility for internal affairs, planning, and research functions for the department. He was promoted to assistant chief in 1997, after serving in a "lieutenant" position that was then comparable to the present "commander" rank and after serving in an "acting commander" capacity comparable to his present position.

Gainer has consistently been involved in labor-management relations on behalf of the employer since 1991. Gainer testified that, as a member of the employer's bargaining team, he has been involved in all aspects of collective bargaining, including preliminary strategy sessions, reviewing proposals before they are presented to the union, discussion of the employer's "bottom-line" positions, and participation in caucuses during bargaining sessions (Tr. 119). Those activities appear to be of an ongoing nature, and the

evidence in this record thus supports acceptance of the parties' stipulation to exclude the assistant chief as a "confidential" employee.³

Administrative Commander -

Terrance Morgan oversees the communications, records, and training/recruitment divisions within the Police Department. He has been in that position since February of 2001, after serving as a commander in the patrol division since 1997.

Meetings of the command team, composed of the chief, the assistant chief and the four commanders, are held on a weekly basis. Issues relating to the existing bargaining units are discussed at those meetings, in the context of maintaining effective departmental operations. Apart from a conflict in the testimony,⁴ the employer's reliance upon alleged mention of the employer's "bottom line" for collective bargaining in one or more command staff meetings is self-contradictory: In light of the employer's acknowledgment that at least two of the four commanders are not "confidential" employees, it must be presumed that the employer will refrain from using those meetings to disseminate labor nexus information in the future.

³ Both *METRO, supra*, and *Yakima, supra*, preclude the existence of a class of excluded personnel other than the executive head of the bargaining unit and "confidential" employees. Thus, acceptance of the parties' stipulation to exclude the assistant chief inherently raises a question as to how many additional confidential exclusions can be justified as "necessary".

⁴ Chief Harris testified that confidential information has been mentioned in command staff meetings, but both Morgan and Billington claimed they have no knowledge of such discussions, or that such information may have been mentioned once in a meeting.

Morgan also takes part in periodic meetings of a labor-management committee composed of the four commanders, four union representatives, and the mayor.⁵ Those meetings are a forum for resolving issues raised by both parties, and for discussing issues that could potentially result in conflicts. Although that forum is an offshoot of the collective bargaining relationship(s), the activity is a natural extension of a supervisory role. The evidence falls far short of establishing that the employer participants are privy to advance preparations that meet the "labor nexus" test.

Morgan has served in an "acting" capacity on rare and irregular occasions when both the chief and assistant chief have been absent. However, that task is typically assigned, at the direction of the assistant chief, by consensus among the commanders.⁶ Further, even though an acting chief could theoretically have access (via an administrative assistant who holds the keys) to grievance files, internal affairs files, and psychological reports on other employees, such materials are only to be retrieved in instances where they are required for an investigation. In fact, Morgan has never been involved in such a situation.

Morgan's job description calls for him to "oversee[s] the development of [the] division budget" for his assigned division, but *City of Yakima*, Decision 4672 (PECB, 1994), establishes the general proposition that responsibility for a budget does not, in and of itself, warrant a "confidential" exclusion. The employer's reliance on budget responsibilities is further weakened by: (1) Its

⁵ The mayor only attends the labor-management committee meetings about 75% of the time.

⁶ The assistant chief testified that, although the commanders make such choices among themselves, the official chain of command would place the operations commanders ahead of the administrative commander.

stipulation that at least two of the four commanders working under the same job description are not confidential employees; and (2) the testimony of James Kriebble, a former commander who served on the employer's bargaining team, that his budget responsibilities did not play any part in the negotiation assignment (Tr. 92).

A conclusion that Morgan has little or no "labor nexus" is thus based on multiple grounds:

First, Morgan not been involved in collective bargaining on behalf of the employer, either in his current position or in his previous assignment.

Second, Morgan has never presented any issues for incorporation into the employer's bargaining proposals.

Third, Morgan has not been involved in either costing-out proposals received by the employer in collective bargaining,⁷ or in developing economic packages for the employer.

Fourth, Morgan has no recollection of attending any meetings with the mayor where potential employer proposals were discussed; he does not know the employer's limitations in bargaining; and he has not seen employer proposals prior to their presentation to a union.

Fifth, even if an incumbent in the administrative commander position had some "labor nexus" assignments in the past, the record

⁷ The testimony suggests that both union and employer proposals have historically been costed-out by Charles Murray, a financial analyst and agreed independent participant, and that none of the commanders who participated in collective bargaining in the past were really involved in computing the economics. (Tr. 218, 219.)

falls far short of establishing that such assignments remain a "necessary", "regular", or "ongoing" function.

The employer's arguments focus on supervisory functions such as assigning personnel to shifts, investigating complaints, evaluating employees on probation, transferring employees, and recommending hiring and discharge of employees, but such functions do not warrant a "confidential" exclusion under RCW 41.56.030(2)(c). See *City of Yakima, supra*, and *City of Seattle, supra*. The union does not contest that the commanders are supervisors, and it has petitioned for a separate unit of supervisors that would be consistent with Commission precedents and WAC 391-35-340.

Speculation that Morgan will (or could) be asked to be a member of an employer bargaining team at some time in the future is not sufficient to sustain the employer's request for a current exclusion of Morgan from all collective bargaining rights.⁸ It is also possible that collective bargaining negotiations could alter or affect the departmental budget in the future, but that might not justify exclusion of a supervisory employee who merely provides input to the employer's labor policy makers or negotiating team concerning the impact of changes or various contract proposals. *King County, Decision 4004-A (PECB, 1992)*.

Operations Commander -

Edward Billington oversees half of the patrol division, plus the traffic division and a crime analysis function. He has held his present position since February of 2001, when he was promoted from

⁸ There is reference to Morgan working on a "CIP" program and proposals, but the record does not clearly explain the "CIP" acronym or its relationship (if any) to the "labor nexus" test. The testimony about "CIP" thus lacks probative value.

a lieutenant position. Billington has been involved in command staff meetings and labor-management meetings, but they fail to warrant an exclusion for the same reasons discussed above.

Above and beyond the assignments attributed to Morgan, Billington has participated in substantial "labor nexus" activities:

First, Billington was assigned to serve as a member of the employer's bargaining team for negotiations concerning the existing bargaining unit of non-supervisory law enforcement officers. That assignment was given to Billington in September of 2001, prior to the hearing in this case, and the negotiations were to commence just after the close of the hearing in this case.

Second, Billington had actually attended preliminary meetings of the employer's bargaining team,⁹ had participated in discussion of issues to be raised by the employer in collective bargaining, and had participated in discussions of the management strategy for those negotiations.

Third, although Billington had not been involved in preparation of a complete economic proposal, he had been involved in confidential discussions about the cost of health care benefits.

Thus, Billington's involvement with collective bargaining cannot be dismissed as speculative. While Billington testified that he did not know the amount of money the City of Redmond would offer in its proposal, he also testified that he was not being excluded from any discussions or caucuses and that he anticipated that information would become known to him at some point in the negotiations.

⁹ The management team that had been meeting since September of 2001 included the employer's human resources director, the attorneys who represent the employer in collective bargaining, and Assistant Chief Larry Gainer.

Although Billington had only had limited actual involvement with labor nexus materials and information up to the time of the hearing in this matter, that was largely attributable to the timing of the negotiations concerning the existing unit of non-supervisory law enforcement officers. The bargaining team member role now assigned to Billington was performed in the past by an employee in the "commander" rank. Former incumbent James Kriebel testified that he knew of the total authorization for the employer's negotiators as those past negotiations proceeded. Kriebel was also involved in discussing employer proposals before they were submitted to the union, and in discussing the allocation of money. Even though Kriebel may have sought to minimize his involvement by stating that he didn't pay much attention to the information and was not involved in discussions of exact dollar amounts, he was not excluded from any bargaining team discussions. The evidence thus supports a conclusion that individuals who participated on the negotiating team in the past were privy to the employer's strategies and proposals before they were communicated to the union, and thus met the "labor nexus" test for exclusion from bargaining rights. Billington had clearly been identified to be a member of the employer's bargaining team, and he had actually begun to participate in that role.

Unauthorized disclosure of even the *range* in which an employer's bargaining team is authorized to operate could damage the collective bargaining process. In light of Billington's actual assignment and the past labor nexus activities described by Kriebel, it is appropriate to conclude that the employer has satisfied its burden to justify exclusion of this position from collective bargaining rights under Chapter 41.56 RCW.

FINDINGS OF FACT

1. The City of Redmond is a "public employer" within the meaning of RCW 41.56.030(1). Among other services, the employer maintains and operates the Redmond Police Department.
2. Service Employees International Union, Local 519, AFL-CIO, a bargaining representative within the meaning of RCW 41.56.030(3), filed a petition with the Public Employment Relations Commission, seeking certification as exclusive bargaining representative for a separate unit of supervisory law enforcement officers, excluding all other classifications.
3. As initially proposed by the union, the bargaining unit would have included five employees, including four employees holding the rank of "commander" and the assistant chief of police. During initial processing of the petition, the parties stipulated to the exclusion of the assistant chief from the bargaining unit and stipulated to the inclusion of two of the commanders in the proposed bargaining unit.
4. The job description promulgated by the employer for the rank of "commander" depicts supervisory positions with the authority to act on behalf of the employer with regard to subordinate employees, including: Hiring, assigning work, scheduling, transfers, evaluation, investigation of complaints, discipline, and discharge, as well as the adjustment of grievances. That job description also requires all employees in the commander rank to attend command staff meetings where operational issues are discussed, to attend labor-management committee meetings with the union that represents the existing bargaining units, and to participate in the budget process for their respective division(s).

5. The employer has existing collective bargaining relationships with the Redmond Police Association, covering separate bargaining units of non-supervisory law enforcement officers and police support personnel. Employees holding the rank of commander have historically been assigned to serve as members of the employer's bargaining team in collective bargaining negotiations concerning those bargaining units. When so assigned, employees in the "commander" rank were involved in analyzing and previewing proposals before they were presented to the union and were privy to confidential information concerning the employer's labor relations policies.
6. Administrative Commander Terrance Morgan has occasionally written memorandums of understanding, collaborated with the assistant chief in writing memos to the union regarding labor-management concerns, and acted as assistant chief, but he has not been assigned to serve on the employer's team for any collective bargaining negotiations. There is insufficient evidence to support a finding that he has necessary, regular, or ongoing involvement with confidential information concerning the labor relations policies and strategies of the employer, or that he has an intimate fiduciary relationship with a management official responsible for labor policy.
7. Day-shift Operations Commander Edward Billington has been assigned to serve on the employer's team for collective bargaining negotiations concerning the existing bargaining units. In connection with that assignment, Billington has been present in meetings of the employer's bargaining team where strategy and issues have been discussed in anticipation of negotiations which were to commence soon after the hearing in this matter.

8. The union has provided a showing of interest indicating that it has the support of more than 70% of the employees eligible for inclusion in the bargaining unit involved in this proceeding.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. A bargaining unit consisting of all full-time and regular part-time supervisory uniformed personnel employed by the City of Redmond in its Police Department, excluding elected officials, officials appointed for a fixed term of office, confidential employees, non-supervisory employees and non-uniformed employees, is an appropriate unit for the purposes of collective bargaining, and a question concerning representation currently exists in that bargaining unit.
3. The administrative commander position, as presently constituted and held by Terrance Morgan, is a public employee within the meaning of RCW 41.56.030(2), and is not a confidential employee within the meaning of RCW 41.56.030(2)(c).
4. The day shift commander position, as presently constituted and held by Edward Billington, is a confidential employee within the meaning of RCW 41.56.030(2)(c), and is thereby excluded from the rights and coverage of Chapter 41.56 RCW.

DIRECTION OF CROSS-CHECK

1. A cross-check of records shall be made under the direction of the Public Employment Relations Commission in the bargaining

unit described in paragraph 2 of the foregoing conclusions of law, to determine whether a majority of the employees in that bargaining unit have authorized Service Employees International Union, Local 519, to represent them for the purposes of collective bargaining.

2. Terrance Morgan is eligible for inclusion in the bargaining unit in this proceedings.

Issued at Olympia, Washington, the 21st day of August, 2001.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order may be appealed to the Commission by filing objections under WAC 391-25-590.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

603 EVERGREEN PLAZA BUILDING
P. O. BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
SAM KINVILLE, COMMISSIONER
JOSEPH W. DUFFY, COMMISSIONER
MARVIN L. SCHURKE, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 08/21/2002

The attached document identified as: DECISION 7814 - PECB has been served by the Public Employment Relations Commission by deposit in the United States mail, on the date issued indicated above, postage prepaid, addressed to the parties and their representatives listed in the docket records of the Commission as indicated below:

PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY:/S/ LORALEE PERKINS

CASE NUMBER: 15762-E-01-02622 FILED: 04/17/2001 FILED BY: PARTY 2
DISPUTE: QCR UNORGANIZED
DETAILS: -
COMMENTS:

EMPLOYER: CITY OF REDMOND
ATTN: ROSEMARIE IVES
15670 NE 85TH ST
PO BOX 97010
REDMOND, WA 98073-9710
Ph1: 425-556-2101

REP BY: DOUGLAS ALBRIGHT
OGDEN MURPHY WALLACE
1601 5TH AVE STE 2100
SEATTLE, WA 98101-1686
Ph1: 206-447-7000

PARTY 2:
ATTN: SEIU, LOCAL 519
DUSTIN FREDERICK
150 DENNY WAY
PO BOX 19360
SEATTLE, WA 98109
Ph1: 206-448-1050

REP BY: THOMAS A LEAHY
SEIU
150 DENNY WAY
PO BOX 19360
SEATTLE, WA 98109
Ph1: 206-448-7348